IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27-03-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE K. MOHAN RAM

H.C.P.NO.108 OF 2007

Ramakrishna Balasubramanian
Rep. by his duly attested
power agent P.R. Balasubramanian
No.5, 3rd Cross Street,
Jayanagar, Tambaram Santorium,
Chennai 600 047. .. Petitioner

Vs.

1. Ms. Priya Ganesan
   D/o.Ganesan
   79/G, Luz Avenue, Mylapore,
   Chennai 600 004.

2. The Commissioner of Police,
   Egmore, Chennai 600 008.

3. The Inspector of Police,
   Chrompet Police Station,
   Chrompet, Chennai. .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Habeas Corpus directing the respondents to produce the petitioner's grand-daughter Miss. Nikhita Ramakrishnan before this Court and set her at liberty by handing over her custody to the petitioner.

For Petitioner : Mr.G. Krishnamurthy SC for
Ms.T.S. Selvarani

For Respondent-1 : Mrs. Geetha Ramaseshan

For Respondents 2 &3: Mr.M. Babu Muthu Meeran
Addl. Public Prosecutor

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O R D E R

P.K. MISRA, J

This Habeas Corpus Petition has been filed on behalf of Ramakrishnan Balasubramanian by his father, who is the attested power of attorney holder. First respondent is the wife of Ramakrishnan Balasubramanian. Respondents 2 and 3 are police officials.

2. Prayer is for a direction to the respondents to secure the daughter of Ramakrishnan Balasubramanian and Respondent No.1. The marriage between Ramakrishnan Balasubramanian and Respondent No.1 took place in India on 4.7.1999. Thereafter the couple lived in United States of America. The daughter was born on 26.3.2004. Respondent No.1 has filed a petition for divorce in the year 2006 in the court of Pennsylvania in United States of America. Respondent No.1 has also filed a custody petition for the custody of the daughter. Even after filing of such proceedings for divorce, the husband and wife were residing in the same house. On 11.1.2007 the husband found that his wife - Respondent No.1 and the daughter - the alleged detenu, were absent. It has been stated :-

> "7. I state that the 1st respondent must have brought the child to India by forging my son's signature in a letter as if my son gave his permission to take the child to India."

On 16.1.2007, the husband approached the Court of Common Pleas, Chester County, Pennsylavania for securing the custody of the child. The relevant portion of the order passed by such court is extracted hereunder :-

> "... 1. Until further order of Court, Father shall have SOLE LEGAL CUSTODY of NIKHITA RAMAKRISHNAN and Father shall have TEMPORARY SOLE PHYSICAL CUSTODY of the child.
>
> 2. Mother shall immediately return the child, and the child's United States passport, to Father's physical custody, or cause the child and the child's passport to be returned to Father's physical custody...."

According to the petitioner's case, in view of the order passed by the Court in U.S.A., the action of Respondent No.1 in keeping the child with herself in Madras (Chennai) is in contravention of the order passed by the American Court and amounts to illegal detention of the child against the court's order and, therefore, the child should be secured and handed over so that she can be taken to United States of America to be handed over to the husband. In the Habeas Corpus Petition it has been stated that the child was ill-treated by

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the first respondent while at United States of America by beating the child and forcing the child to remain outside the home without adequate clothing. It is further alleged that during the last visit of the first respondent with the child to India, the child had suffered serious urinary infection because of the negligence of the mother. It has been further stated in the petition that after coming to India, Respondent No.1 with a view to harass the parents of the husband, has preferred baseless and illegal complaint alleging commission of offence under the Dowry Prohibition Act at "All Women Police Station, Mylapore". It has been further stated that the deponent has lodged a complaint before the police on 19.1.2007, but no action was taken. Further complaint was filed on 22.1.2007 for recovery of the child from the illegal custody, but the third respondent refused to receive the same and subsequently such complaint was sent by registered post. On the basis of such allegations, the Habeas Corpus Petition, which was sworn to by the father of the petitioner-husband, was filed on 24.1.2007. Along with the petition, copy of the temporary custody order and copies of some other documents have been filed. A power of attorney executed by the petitioner in favour of his father authorising him to take action is filed.

3. After service of notice, Respondent No.1 has entered appearance and filed a counter affidavit. Marriage of the parties in India and subsequent birth of the child in United States of America is admitted. It is, however, stated in the counter that her husband had subjected her to extreme harassment and cruelty as a result of which she was forced to leave United States of America and come back to India. It has been further stated that O.P.No.193 of 2007 has been filed before I Addl. Family Court seeking for dissolution of marriage as well as custody of the child and alimony. It has been further stated that even though divorce proceedings had been initiated in September, 2006 in United States of America, she cannot continue the same as she is unable to live in United States of America due to the conduct of the husband. It has been further stated that there is no order of legal separation between the parties and the proceedings were pending at the time when she came to India. It is alleged that the conduct of the husband was unbearable and she was subjected to cruelty and was left with no resources and she was employed in a part-time job in a bank to take care of the minor child. It has been further stated :-

> "4. ... I submit that on 7th and 8th of January, 2007, the Petitioner's son picked up a big quarrel with me threatened to finish me and take away the child. He also told me that he would see to it that my mother and I are on the streets. I told him that if this is a situation I would come away to India since there was no safety and security for me in the USA. I also told him that I would like to decide the future course of action in India which

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he acknowledged. I submit that I came away to India on 11.01.2007."

It has been further stated that no order regarding custody of the child had been passed while she was at United States of America and such order was passed only after she came to India. The allegation regarding ill-treatment of the child has been denied. It is asserted that a false complaint had been given to the Department of Children, Youth and families in United States of America, but the Department after investigation did not find any truth in the allegation. The fact that the child was suffering from urinary infection is not denied, but it is stated that there was no negligence on the part of the deponent. It has been further stated that appropriate proceedings had been initiated in India and the matter has been posted for the appearance on 22.2.2007 and she has already intimated her counsel in United States of America that she does not wish to proceed with the case filed in United States of America.

4. While the present Habeas Corpus Petition was pending, the husband came from United States of America. We had called upon the husband and wife to remain present in court with a view to explore the possibility of reconciliation or amicable settlement of the dispute. However, both the parties and their Advocates have clearly stated that there is no possibility of any reconciliation nor there is any possibility of amicable solution.

5. The main problem obviously is relating to custody of the child. Admittedly the child is yet to complete three years.

6. Learned counsel appearing for the petitioner has raised the following contentions :

(1) In view of the order passed by the competent court in United States of America and in view of the provisions contained in Section 13 of the Code of Civil Procedure (hereinafter referred to as "the C.P.C."), Respondent No.1 is bound to handover the custody of the child to the father.

(2) Father being the natural guardian of the child, there is no justification for Respondent No.1 to bring the child from United States of America and to detain her illegally.

7. Learned counsel appearing for Respondent No.1, on the other hand, has raised the following contentions :-

(1) In view of the provisions contained in Section 6 of the Hindu Minority and Guardianship Act, 1956, the mother is entitled to retain custody of the minor child under the age of five.

(2) The ex-parte order passed by United States of America court, while Respondent No.1 had already left United States of

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America, should not be enforced. Moreover, such order is not an order on merit and merely an ex-parte interim order.

(3) Since Respondent No.1 has abandoned divorce proceedings in United States of America and initiated appropriate proceedings in the competent court in India, the matter should be decided in accordance with law applicable to the parties, who are admittedly governed by the Hindu Minority and Guardianship Act.

8. Before considering the main questions, certain undisputed facts may be noticed.

(1) Both the husband and wife are Green card holders, even though they continue to be Indian citizens and passport holders.

(2) The child being born in United States of America is obviously a citizen of United States of America by birth.

(3) However, she is also an Indian citizen by virtue of the fact that she is the child of two Indian citizens. (This is so in view of the provisions contained in Section 4(1)(3) of the Indian Citizenship Act).

9. First contention of the counsel for the petitioner is based on the provisions contained in Section 13 C.P.C. The expression "foreign judgment" has been defined in Section 2(6) of the C.P.C. to mean the judgment of a foreign court.

10. The order relied upon by the petitioner expressly purports to be an interim order relating to interim custody until further orders. Therefore, such order cannot assume the characteristic of a foreign judgment as the order does not appear to be a final order. Moreover, such order was admittedly passed when Respondent No.1 had left the territorial jurisdiction of the court.

11. Learned counsel for the petitioner has placed reliance upon the decision of the Supreme Court reported in AIR 1984 SC 1224 (SMT. SURINDER KAUR SANDHU v. HARBAX SINGH SANDHU AND ANOTHER). Even the counsel for Respondent No.1 has also placed reliance upon such decision. A careful reading of the said decision indicates that the question was relating to the validity of a final order of judgment and not an interlocutory order. Moreover, the Supreme Court, while considering the question as to whether minor should should be with the father or the mother, examined the question of welfare of the minor as an important consideration. The said decision will not come to the aid of the petitioner as, in the present case, the petitioner is relying upon an interim order and not a final order. Moreover, even assuming that the order relied upon is a final order, before directing handing over of the child pursuant to the said order, this Court is required to find out the welfare of the said which is of paramount importance. The Supreme Court observed :-

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"8. . . . On the whole, we are unable to agree that the welfare of the boy requires that he should live with his father or with the grand-parents. The father is a man without character who offered solicitation to the commission of his wife's murder. The wife obtained an order of probation for him but, he abused her magnanimity by running away with the boy soon after the probationary period was over. Even in that act, he displayed a singular lack of respect for law by obtaining a duplicate passport for the boy on an untrue representation that the original passport was lost. The original passport was, to his knowledge, in the keeping of his wife. In this background, we do not regard the affluence of the husband's parents to be a circumstance of such over-whelming importance as to tilt the balance in favour of the father on the question of what is truly for the welfare of the minor. At any rate, we are unable to agree that it will be less for the welfare of the minor if he lived with his mother. He was whisked away from her and the question is whether, there are any circumstances to support the view that the new environment in which he is wrongfully brought is more conducive to his welfare. He is about 8 years of age and the loving care of the mother ought not to be denied to him. The father is made of coarse stuff. The mother earns an income of £ 100 a week, which is certainly not large by English standards, but is not so low as not to enable her to take reasonable care of the boy.

9. Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. As the matters are presented to us today, the boy, from his own point of view, ought to be in the custody of the mother.

10. We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. it cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modem theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where. the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to

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say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing, him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the Courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See International Shoe Company v. State of Washington, (1945) 90 L Ed 95, which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case). It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

(Emphasis added)

Ultimately, the appeal was allowed and a direction was given giving custody of the child to the mother.

12. From a reading of the aforesaid decision, it is of course apparent that the Supreme Court in the said case found that the British Court had jurisdiction to decide the question of custody of the minor child, who was a British citizen. However, it cannot be said that the Supreme Court rested its decision merely on the ground that an order of a foreign court was to be enforced and obviously the Supreme Court considered the question of welfare of the minor.

13. Learned counsel for the petitioner has placed strong reliance upon the Full Bench decision of Kerala High Court reported in AIR 1970 Kerala 1 (MARGGARATE MARIA PULPARAMPIL NEE FELDMAN v. Dr. CHACKO PULPARAMPIL AND OTHERS). In the said decision, it was observed :-

"14. Following the above decisions we hold that this Court should respect the order of the German Court and allow this petition unless such a course is not in the interests of the welfare of the children.

We are aware that the father is the legal and the natural guardian. And it is arguable that even when the children are in the control of the mother, the legal custody continues with the father and that if the father

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takes the children from the mother his custody will not be illegal as he has got legal authority for the custody of the children. This certainly will not apply in all cases and in all circumstances. This is clear even from the decision in AIR 1914 PC 41 relied on by 1st respondent's counsel. Whether the rule will apply in a case where there was a solemn agreement between the father and the mother that the children should be with the mother is doubtful. Authority is not wanting that in such cases a unilateral breach of that agreement by the father or the mother will not be countenanced by Courts. Whatever that be, if such an agreement is accepted by a court of competent jurisdiction and embodied in an order of that Court, we feel no doubt that that order can neither be ignored nor flouted with impunity by one of the spouses."

14. Even the aforesaid decision recognizes the principle that while considering such aspects, paramount consideration is welfare of the child.

15. Whatever little doubt one could entertain on such aspects, in our considered opinion, the decision of the Supreme Court reported in AIR 2000 SC 1019 (SARITA SHARMA v. SUSHIL SHARMA), relied upon by learned counsel for Respondent No.1 makes the position very clear that while considering such aspects, notwithstanding the fact that there may be some foreign judgment, the court is required to weigh the welfare of the child as the prime consideration. In such decision, after noticing the decision of the Supreme Court in AIR 1984 SC 1224 (cited supra), it was observed :-

"6. Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A. despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. . . . . Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away of U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody

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of the children. The chances of the appellant returning to U.S.A. with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the Court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court. There is a possibility that both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights." (Emphasis added)

16. Parties being admittedly Hindu, obviously the Hindu Minority and Guardianship Act, 1956 is applicable. Sections 6 and 7 of such Act being relevant, are extracted hereunder :-

"6. Natural guardians of a Hindu minor.- The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl - the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father;

(c) in the case of a married girl - the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section -

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world becoming a hermit (*vanaprastha*) or an ascetic *(yati or sanyasi*).

7. Natural guardianship of adopted son.- The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother."

17. A conjoint reading of the aforesaid provisions makes it clear that father is the guardian of a minor child. However, when the child is less than five years, ordinarily custody of the child should be with the mother. Ultimately, the Court is required to find out what is best for the interest of the child and even in a fit case, custody of a minor child can be with a person other than the father and mother of the child. The paramount consideration is the welfare of the child.

18. Learned counsel appearing for the petitioner has cited at least a dozen decisions highlighting such aspect. It is not

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necessary to refer to all such decisions, save and except a few decisions of the Apex Court. In AIR 1982 SC 1276 (THRITY HOSHIE DOLIKUKA v. HOSHIAM SHAVAKSHA DOLIKUKA), it was observed :-

> "17. The principles of law in relation to the custody of a minor appear to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor.
>
> 18. In Halsbury's Laws of England, 3rd Edn., Vol.21, the Law is succinctly stated in para 428 at pp.193-194 in the following terms:-
>
> > "428. Infant's welfare paramount. In any proceedings before any Court, concerning the custody or upbringing of an infant or the administration of any property belonging to or held on trust for an infant or the application of the income thereof, the Court must regard the welfare of the infant as the first and paramount consideration, and must not take into consideration, whether from any other point of view, the claim of the father, or any right at common law possessed by the father in respect of such custody, upbringing administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father. This provision applies whether both parents are living or either or both is or are dead.
> >
> > Even where the infant is a foreign national, the Court, while giving weight to the views of the foreign Court, is bound to treat the welfare of the infant as being of the first and paramount consideration whatever orders may have been made by the Courts of any other country."
>
> (Emphasis added by us)

19. Learned counsel for the petitioner has placed strong reliance upon the decision of the Supreme Court reported in AIR 1987 SC 3 (MRS. ELIZABETH DINSHAW v. ARVAND M. DINSHAW AND ANOTHER), wherein the Supreme Court while upholding the prayer of the mother, an American, criticised the conduct of the Indian father, who had brought the child to India notwithstanding the order passed by the American Court. However, in the said decision, the Supreme Court also recognised the fact that interest and welfare of the minor is paramount by observing:-

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"8. Whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole an predominant criterion what would best serve the interest and welfare of the minor."

20. The other decisions of several High Courts, including those of Madras High Court, only reflect the aforesaid aspect that the child's welfare is of paramount consideration and have recognized the various facets. From the conspectus of the decisions noticed and referred to above, it can be said that, while considering the question of grant of custody, even where one or the other party is armed with a decision of a competent foreign court, the Indian Court asked to give effect to the decision of such foreign court is not to be guided merely by the considerations highlighted in Section 13 CPC regarding enforceability of foreign judgment, but required to consider the welfare of the minor as the paramount consideration. This position is clear from the decision of the Supreme Court in AIR 1984 SC 1224 (cited supra), AIR 1970 KERALA 1 (cited supra), which have been relied upon by the counsel for the petitioner himself , and from the decision of the Supreme Court in AIR 2000 SC 1019 (cited supra). Keeping in view the aforesaid principle, the question to be now considered is whether custody of the minor child should be handed over to the father.

21. It is no doubt true that the father is armed with an order of the foreign court, but such order appears to be merely interlocutory. The materials which have been highlighted in the Habeas Corpus Petition either by the petitioner or even by Respondent No.1 have not focussed on the paramount consideration relating to welfare of the minor and both the parties are relying upon their so called rights. Father is relying upon the fact that under Section 6 of the Hindu Minority and Guardianship Act, he is the guardian of the minor child. He is also harping upon the interlocutory order passed by the American court. Mother of the child is emphasizing upon the proviso contained in Section 6(a) to the effect that the minor who has not completed the age of five years would ordinarily be with the mother. She also submitted that at the time when she came to India, there was no order relating to interim custody and, therefore, it cannot be said that she had willfully violated any order of the competent court.

22. A bare reading of Section 13 of the Hindu Minority and Guardianship Act, 1956 and the various decisions noticed earlier, leaves no room for doubt that notwithstanding the so called right of either parents to be the guardian, ultimately the welfare of the minor is of paramount consideration. The decisions which have been noted, only emphasis this aspect. The question as to what would constitute in the best interest of the minor would obviously depend upon several circumstances. As already noticed, materials which have been indicated in the petition or in the counter affidavit do not

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throw much light on such vital aspect. In such circumstances, we do not think it appropriate to finalise the matter relating to custody of the minor child on the basis of the incomplete materials in this Habeas Corpus Petition. On the other hand, since admittedly a proceeding has been initiated at the instance of the wife before the I Addl. Family Court, Madras and the husband has entered appearance and has taken time for filing counter, we direct that the question relating to custody should be finalised by the said court in accordance with law. It goes without saying that such court will decide the matter on the basis of the relevant evidence to be adduced by both the parties and our present order should not be construed as expressing any opinion on either way in the matter.

23. During pendency of this Habeas Corpus, some interim arrangement has been made giving opportunity to the father to take the child and to spend sometime with the child. We feel interest of justice would be served by directing that the mother shall permit the child to be with the father between 10.30 AM and 4.00 PM twice a week during working days, preferably on Monday and Thursday. For the aforesaid purpose, the child can be brought to the office of the concerned Advocate.

24. If the father of the child finds it difficult to stay on for finalisation of the proceedings, it would be obviously open for him to authorise his father, who has filed the present Habeas Corpus Petition, on his behalf to prosecute such proceedings before the concerned Family Court and it is expected that no unnecessary technical plea should be permitted to be raised on such aspect.

25. Keeping in view the urgency of the matter, we further direct the I Addl. Judge, Family Court, Madras to dispose of the matter by the end of June, 2007. Keeping in view the complexity of the matter, we further direct that both the parties shall be permitted to appear through their Advocates, if they so desire.

26. Subject to the aforesaid observations and directions, the Habeas Corpus Petition is disposed of.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Commissioner of Police,
   Egmore, Chennai 600 008.

2. The Inspector of Police,
   Chrompet Police Station,
   Chrompet, Chennai.

3. The Public Prosecutor,
   High Court, Madras.

4. The I Addl. Judge Family Court,
   High Court Buildings,
   Chennai 600 104.

+1cc to Mr.T.S.Selvaraj, Advocate Sr 19227
+1cc to Mr.Geetha Ramaseshan, Advocate Sr 19314

VC (CO)
km/9.4.

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